Supreme Court, U. S.
FILED
JUN 1 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 76-1707

JUAN M. HUERTA, *Petitioner*

v.

THE UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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No.

JUAN M. HUERTA, *Petitioner*

v.

THE UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner, Juan Huerta, respectfully prays that a Writ of Certiorari issue to review the opinion, judgment and order of the Court of Claims in this case.

OPINIONS BELOW

The 2-1 opinion of the Court of Claims is reported at 548 F.2d 343. It appears in App. A. Judge Davis' dissent appears at App. A-10. The order of the Court of Claims denying Petitioner's motion for rehearing is set forth at App. A-13. That order is not officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on 26 January 1977. Petitioner's motion for rehearing was denied on 4 March 1977. This Court's jurisdiction is invoked under 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

1. Whether a taking, by legislative act and Presidential proclamation, of Petitioner's salvaged materials at the Guantanamo Naval Base, was a "taking" under the Fifth Amendment?

2. Whether there was also a "taking" under the Fifth Amendment when undisputed evidence shows (a) that the bulk of Petitioner's salvaged materials were physically taken by Respondent's employees at Guantanamo and there incorporated into U. S. Government buildings, and (b) that all of Petitioner's materials wound up in the hands of Respondent?

3. Whether there was also a "taking" under the Fifth Amendment when (a) diplomatic relations between the United States and Cuba were broken on 1 January 1961, (b) military hostilities resulted in the Bay of Pigs, (c) undisputed evidence, erroneously disregarded by the Court below, shows that it became the official Navy position at Guantanamo to refuse to permit Petitioner's materials to be removed into Cuba because that would help the Castro government; and (d) all Petitioner's materials wound up in the hands of Respondent at Guantanamo?

4. Whether Petitioner was deprived of procedural due process when the Court failed to decide in accordance with the evidence by erroneously disregarding the following undisputed evidence strongly supporting Petitioner's case:

a. The undisputed testimony of a Government witness, Sergeant Alvarez, that it was the official position of the Navy officials at Guantanamo to refuse to grant Petitioner permission to remove his salvaged

materials from Guantanamo into Cuba because that would help the Castro Government.

b. Undisputed evidence that Petitioner made repeated prior consistent statements that he had requested permission to remove the materials from Guantanamo into Cuba.

c. Undisputed admissions by Navy officials that there had been requests to remove the materials, made by the Navy's failure, in a business relationship, to deny Petitioner's writings stating that there had been requests.

THE CONSTITUTIONAL, STATUTORY AND TREATY PROVISIONS INVOLVED

The "taking" and due process clauses of the Fifth Amendment to the Constitution of the United States are set forth in Appendix B.

In addition, excerpts from the following are set forth in Appendix B:

1. The Export Control Act of 1949, 50 U.S.C. App. § 2021 et seq.;
2. Current Export Bulletin No. 840;
3. The Foreign Assistance Act of 1961, 22 U.S.C.A. 2370 (a)(1);
4. Proclamation No. 3447, issued by President Kennedy on 3 February 1962, 27 Fed. Reg. 1085, pursuant to the Foreign Assistance Act of 1961 and Export Control Act, placing an embargo on trade between the United States and Cuba;
5. The treaties with Cuba (Agreement with Cuba, 23 February 1903, Treaty Series No. 418 and

426) which established the Guantanamo Naval Base.

STATEMENT OF THE CASE

A. Earlier Contracts at Guantanamo: Petitioner, a businessman in Santiago de Cuba, became a Cuban refugee in 1963, and a U. S. citizen in 1974. Beginning in 1958, Petitioner, with the assistance of his brother Guillermo Huerta, entered into several contracts with the Navy for demolition and removal of buildings at the Guantanamo Naval Base at Guantanamo, Cuba ("Guantanamo"). In 1958, Petitioner performed contracts for the demolition of a hospital complex and a recreation building at Guantanamo (64, 65, 244[1]).

After Castro came into power on 1 January 1959, Petitioner performed, among others, a large contract for the demolition of sixty-two Quonset Huts at Guantanamo. Part of the salvaged materials were sold to the Castro Government, for which the Castro Government paid $40,000 in advance of delivery (81-85, 258).

In each case, when he had dismantled the buildings and reconditioned the salvaged materials and was ready to remove them, Petitioner orally requested permission of the Public Works officials to take the materials from Guantanamo into Cuba (66, 246). The officials invariably provided a pass or letter which granted permission to take the materials through the Northeast Gate, the only route for going by land from Guantanamo to Cuba (67, 246, 247). Then Petitioner removed the materials from Guantanamo into Cuba,

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[1] The numbered references are to the transcript of the testimony at the Trial.

where there was a brisk market for the salvaged materials, and sold them (66-83, 88-89, 246-267).

B. September 1960: Five Demolition Contracts on the Villamar Project Begin: Beginning in September 1960, Petitioner entered into five contracts with the Navy for the demolition of 84 buildings in the Villamar area at Guantanamo (PX 1-5)[2]. Under the contracts, Petitioner obtained title to the valuable materials to be salvaged from the buildings immediately upon entering into the demolition contract. Indeed, the materials were the main consideration to Petitioner for performing the demolition and salvage work. He could profit by the transaction only if he took the materials to Cuba and sold them there. No other recourse was available because the Treaties with Cuba prohibited any "commercial, industrial or other enterprise" at Guantanamo (App. B-6), and Guantanamo officials refused to allow Petitioner to sell the materials elsewhere (127-128, 201-206, PX 29, 37).

C. January 1961: Trouble Starts: We Break Diplomatic Relations With Cuba: Military Hostilities Follow: Castro came in to power in Cuba in January 1959. Then, on 1 January 1961—right in the middle of the performance of Petitioner's first two contracts—there was a disturbing development which thereafter drastically influenced the Navy's attitude toward Petitioner. On 1 January 19[illegible] diplomatic relations between the United States an[illegible]ba were broken (144). Thereafter, Guantanamo Base Policy was not to help Castro (368-88, 517-18, 574).

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[2] "PX" refers to a Plaintiff Exhibit.

Then there were military hostilities at the Bay of Pigs in April 1961 (144). This further stiffened the attitude of Navy officials toward Cuba (144, 145, 335, 336).

On 3 February 1962, President Kennedy proclaimed "an embargo upon trade between the United States and Cuba" (Proclamation No. 3447, 27 Fed. Reg. 1085, App. B-2, 3). Current Export Bulletin No. 840, prohibiting most exports from the United States to Cuba, had gone into effect on October 19, 1960 (App. B-6, 7), but the parties had paid no attention to it (Finding 39).

Finally, the Missile Base crisis in October 1962 further worsened relations with Cuba at Guantanamo (145, 324, 552).

D. Navy Officials Refused to Permit the Materials To Be Removed into Cuba: In late 1960, Petitioner and Respondent arranged for Petitioner to use a remote and deserted part of the Guantanamo Base (323, 328) as a storage area where salvaged materials could be reconditioned as a necessary prerequisite to shipping them into Cuba (99, 275-278, 323, 328, PX-12a). But the salvaged materials, worth up to $900,000 (PX 57), were never shipped into Cuba. Here we come to Sergeant Alvarez' undisputed testimony.

Sergeant Alvarez was a Marine Corps officer—an employee of Respondent—at Guantanamo (384). Beginning in May, 1962 he supervised Petitioner and his brother in intelligence activities for the U. S. Government (392). They were U. S. Intelligence agents working in an official capacity for Sergeant Alvarez during this critical period, and rendered valuable services to the United States (383-386).

At the trial Sergeant Alvarez was under the control of Defendant. He was finally produced by Defendant only at Petitioner's urgent request (123). His testimony is undisputed. He testified from personal knowledge as to official acts performed on behalf of the government. But the Trial Judge, affirmed by the Court below, erroneously disregarded his testimony on the astounding ground that it was "hearsay" (App. A-7, Finding 59).

Specifically, Sergeant Alvarez testified that on "numerous occasions" Petitioner had hold him that Petitioner had made repeated requests for permission to remove the salvaged materials into Cuba, and that his requests had never been granted (385-96). Moreover, he testified that Petitioner also asked his help in getting Petitioner's requests granted by Navy officials, and as to the official acts which he performed as a result. He decided to "intercede" with his superiors to try to get the necessary permission, in order not to jeopardize the confidence of Petitioner and his brother which had been developed during their intelligence work for him (386). And he did intercede with his superiors, who consulted with, among others, the Public Works officials (385, 386, 387, 393, 396-399).

Interestingly enough, Sergeant Alvarez was then told by his superiors that they and Navy Public Works officials already knew all about Petitioner's terials (395-399). In addition, they gave Alvarez a "definitive answer" to his question. It was negative. They told Alvarez that the position of the top Base officials was that the "diplomatic situation" was such that permission to Petitioner to remove the materials into Cuba would not be granted (386, 387, 394, 395). It was

Guantanamo Base policy not to help the Castro Government (336, 386-88, 517-18, 574).

Prior to January 1961, when diplomatic relations with Cuba were broken, Petitioner had always been able to get permission to remove his materials. Thereafter he could never get it. Thus, the breaking off of diplomatic relations, and the Bay of Pigs episode in April 1961, changed the attitude of the Navy officials at Guantanamo toward Petitioner. Thereafter they refused to permit the materials to go into Cuba (386, 387, 394, 395).

In more specific language, the position of the Naval officials at Guantanamo was that authority to Petitioner to take the materials into Cuba would not be granted (386-87). "[W]ord came down that nothing could be done for the Huertas" (394, 395). "[I]t was not possible for them to take" the salvaged materials back to Cuba (386). And see 122-125, 302, 304, 318, 373. "[W]e could not get the permission that they [the Huertas] wanted" (395). "[T]he policy of officials at the Base . . . was not to help the Castro regime" (517, 518, 574). All this is undisputed.

Moreover, this undisputed testimony of Sergeant Alvarez constituted powerful admissions against interest of his employer, the Respondent, evidence of the strongest character in support of Petitioner. See page 14, post.

E. The Physical Taking of the Materials by Respondent's Employees, in Military Uniform and Using U. S. Government Trucks:

Meanwhile, employees of the Government, military personnel, Marines and Seabees, in military uniform (129, 131, 326), and civilian employees (128-130, 326),

and using U. S. Government trucks (125, 129, 192, 194, 195, 325, 326, 327), "countless times" (325, 326), in broad daylight and during working hours, were "progressively and systematically" removing materials from Petitioner's lonely storage area and incorporating them into U. S. Government buildings at Guantanamo (125, 128-130, 143, 185, 192-196, 199, 200-210, 219, 220, 230, 313, 323-330, 343-348, 396, 424-427, 552, 629, 697, PX-28). This strong evidence is undisputed. Indeed, the Trial Judge even complained that the evidence of the physical takings was excessive and "repetitive" (697, 698).[3] And see Judge Davis' dissent, App. A-10.

Further, it is undisputed that during the Missile Base Crisis in October 1962, there was a massive taking of Petitioner's materials by 5,000 new Marines who descended on the Base "for the construction of their pill boxes, fortifications. . . ." etc. (324, 552).

Moreover, apart from this direct evidence, the undisputed circumstantial evidence also shows with compelling force that the materials taken by Respondent's employees could not have gone anywhere but into Government property at Guantanamo. For there is no privately owned real estate at Guantanamo. It is a U. S. leasehold, committed exclusively for use as a Naval station. (Agreement with Cuba, 23 February 1903, T.S. Nos. 418 and 426, App. B-4-6). Each and every building at Guantanamo is U. S. Government owned.

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[3] On rebuttal the Trial Judge finally became fed up with the large amount of evidence of the physical taking of Petitioner's materials by Respondent's employees, which had turned out to be undisputed. He said, "How many times do we have to hear this testimony. . . . . It's not only repetitive of other witnesses but it's repetitive of your case in chief." (697, 698).

Indeed, each one even carries a Navy number. See the maps of the Base (PX 12); and Judge Davis' dissent (App. A-10).

The "bits and pieces" of the materials remaining in 1973 were worthless (132, 329, 330). Except for tiny sales made at Guantanamo through April 1962, aggregating $4,136 (PX 55), every item of Petitioner's materials wound up in the hands of Respondent (184-186, 199, 200-208, 329-330; PX 42).

Moreover, the Trial Judge, affirmed by the Court below, found—admitted—that a substantial amount of Petitioner's materials "were removed by civilian residents on the base for their own uses, such as construction projects in family residences." (Finding 83). But they implied that these "family residences" were not Government property (Finding 83). In so indicating, the Court below was in serious error. Again, there is no privately owned real estate at Guantanamo. Each and every building at Guantanamo is owned by the U. S. Government. In addition, Respondent did not even deny in the Court below that all the buildings at Guantanamo are Government property. Thus, it is undisputed on this record that the materials physically taken from Petitioner by civilian employees of Respondent were incorporated into "family residences" which were Government buildings at Guantanamo.

F. The Holding of the Court Below: The Court of Claims took jurisdiction of the case under 28 U.S.C. § 1491. It held that there was no breach of contract because there were no "requests" by Petitioner for permission to remove the materials from Guantanamo into Cuba.

In so holding, the Court erroneously disregarded and failed to consider certain undisputed evidence. It

failed to decide in accordance with the evidence. See page 13, post.

Second, the Court below held that there was no physical "taking" under the Fifth Amendment. In so holding, it disregarded the strong, undisputed evidence that Government employees, Seabees and Marines—in uniform, and using Government trucks, in broad daylight, and during working hours—took Petitioner's materials and incorporated them into Government buildings. See Judge Davis' dissent, which was not controverted by the majority opinion (App. A-10). We submit that this undisputed evidence shows that Petitioner's materials were "taken" by Respondent within the meaning of the Fifth Amendment.

Third, the Court below held that a taking of Petitioner's materials by Act of Congress and Presidential Proclamation was not a "taking" under the Fifth Amendment. It followed the Contracting Officer. In his decision of 9 August 1967, the Contracting Officer had stated that "to the extent that you were also prevented from shipping this material to Cuba by provisions of the Trade Embargo Act of 1962 [sic], this law is a sovereign act, and the Government as a contractor is not responsible for the consequences or effect thereof." (App. to Pl. Req. for Findings dated 10 October 1974.)

In the Court below Respondent, echoing the Contracting Officer, argued (Res. Brief p. 26) that any removal of the materials into Cuba "would have been barred by current Export Bulletin No. 840, issued under the Export Control Act of 1949 . . . Bulletin No. 840 is clearly a public and general act of the United States, the consequences of which cannot enable the

plaintiff to just compensation under the Fifth Amendment." "[T]he United States is not liable under the Fifth Amendment for its acts performed in a sovereign capacity. (Res. Brief p. 29).

The Court below adapted Respondent's argument. Tucked away in a potent footnote, it held that Export Control Bulletin 840 and the 1962 Trade Embargo (App. B-2-6) had the effect of "depriving" Petitioner "of his property" but that this did "not establish liability . . . for a taking." App. A-9, footnote 2.

REASONS FOR GRANTING THE WRIT

I. Conflict With Decisions of This Court: The Court below has decided a federal question in conflict with decisions of this Court. It held that "depriving Petitioner of his property" by certain legislative and Executive acts—the Export Control Act of 1949, Current Export Bulletin 840, and President Kennedy's Trade Embargo Proclamation of 3 February 1962, App. B-1-4, did not "establish liability . . . for a taking" under the Fifth Amendment, App. A-9, footnote 2. In its order denying Petitioner's Motion for Rehearing, the Court below reemphasized this holding by adding the words "in the circumstances of this case" after the word "taking" (App. A-13).

It is settled that a taking under the Fifth Amendment can result from a sovereign act, including legislative and executive acts.

Thus, this Court has held repeatedly that a sovereign act may constitute a taking. It held that the Government "took" property under the Fifth Amendment by means of an Executive Order of general application in *U. S.* v. *Pewee Coal Co.*, 341 U.S. 114, 95 L.Ed.

809 (1951); by a State statute destroying "previously existing rights of property and contract," *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 413; 67 L.Ed. 322 (1922); through such sovereign acts as flying military planes over private property, *United States* v. *Causby,* 328 U.S. 256, 90 L.Ed. 1206 (1946); and by the maintaining of the Mississippi River at its high water level, *United States* v. *Kansas City Life Ins.* 339 U.S. 799, 94 L.Ed. 1277 (1950).

In our case, the taking was direct, complete and absolute. The Court below held that Petitioner was "deprived . . . of his property" by the sovereign acts. That was a taking. In addition, Respondent itself took complete and absolute dominion over Petitioner's materials and consumed them all—a second taking.

II. Denial of Procedural Due Process: The Court below deprived Petitioner of procedural due process, in that (a) it refused to consider undisputed evidence, and (b) failed to decide in accordance with the evidence.

A major issue before the Court of Claims revolved around the reason why the materials were not taken to Cuba. Plaintiff's witnesses testified that Plaintiff repeatedly requested permission of Navy officials to remove the materials, but that such permission was never granted (103-07, 281-85, 301, 384, 487, PX 8). This testimony was strongly supported by the following undisputed evidence which the Court below erroneously disregarded and failed to consider:

A. In holding that there were no "requests" by Petitioner for permission to remove the materials from Guantanamo into Cuba, the Court below, affirming the Trial Judge, erroneously disregarded as "hearsay" the potent and undisputed testimony of a Government

employee, Sergeant Alvarez, which strongly supported Petitioner's case that there were requests, *supra* p. 6-8. The Alvarez testimony constituted admissions against interest of Respondent. *Federal Rules of Evidence,* 801(d)(2); 29 *Am.Jur.* 2d, *Evidence,* §597; 31A C.J.S., "*Evidence*" §311 (such testimony is "primary evidence"); *Wigmore on Evidence* §1048; *McCormick on Evidence* pp. 639-641 (2nd ed.).

Above all, any conflict in the testimony should have been resolved with the aid of a consideration of the Alvarez' testimony. In failing to consider Alvarez' testimony, the Court below deprived Petitioner of procedural due process and failed in its duty to decide in accordance with the evidence. *Morgan* v. *United States,* 304 U.S. 1, 82 L.Ed. 172.

B. The Court below also refused to consider the strong evidence of Petitioner's repeated prior consistent statements to Silvio Cardero (31, 126, 304), Doris Navarro (126, 220, 223, 302), Sergeant Alvarez (126, 301-304, 384-396), Perez Valencuello (126), Robert Pendleton (126, 304), and others (126), that he had made repeated requests for permission to remove the materials into Cuba. It is elementary that prior consistent statements are properly admissible in evidence to rebut an implied charge of recent fabrication. Federal Rules of Evidence 801(d)(1)(B); *McCormick on Evidence,* 2d ed., §252, p. 604; *Jones on Evidence,* 6th ed., §10:19. Again, the Court below gave no reason for disregarding this evidence. Again, in refusing to consider this evidence, the Court below denied Petitioner procedural due process by failing to decide in accordance with the evidence.

C. The Court below also erroneously disregarded as "hearsay" (App. A-7, Fdg. 59) the undisputed testi-

mony of Sergeant Alvarez that it was the official position of the Navy officials at Guantanamo to refuse permission to Petitioner to remove the materials into Cuba because that would help the Castro Government, D. *supra*, p. 6-8. In disregarding this undisputed evidence, these admissions against interest of Respondent, the Court below again deprived Petitioner of procedural due process by refusing to decide in accordance with the evidence.

D. The Court below also erroneously refused to consider Respondent's admissions that there were requests for permission to remove the materials into Cuba. These admissions stemmed from Respondent's failure to deny Petitioner's written statements, made in a business relationship, that there were such requests. Please see App. C-1. It is settled that a failure to deny statements made in a business relationship constitutes an admission that the statements are true. *McCormick on Evidence,* 2d ed., pages 653, 654, *"Admissions"; Jones on Evidence,* 6th ed., § 13-49; *Wigmore on Evidence* (Chadbourne Rev. 1922) § 267, 292, 1072; *Helenic Lines Ltd.* v. *Gulf Oil Co.,* 340 F.2d 398 (2d Cir., 1965). Again, the Court below gave no reason for refusing to consider this evidence.

E. Respondent's witnesses, Captain Burky and Lt. Cronenberg, consistently with the anti-Castro position of Navy officials at Guantanamo—testified that Plaintiff never made requests to remove the materials into Cuba, on the theory that if he did the materials would be "confiscated." (294-94, 546-48). But it is undisputed in any event that the "confiscation" of the salvaged materials would have been a physical impossibility, inasmuch as, consistent with prior practice under previous demolition contracts, it is undisputed

that the salvaged materials would have been shipped into Cuba in approximately 250 truckloads over a substantial period of time. No more than 2 truckloads would have been delivered at any one time, and payment for them would have had to be made before there would have been further delivery. (93, 624, 693, 394). Thus, even if the Cuban Government had had some desire to "confiscate" the materials—and the undisputed evidence is to the contrary, that the Cuban government was desperately eager to purchase them (313, 380, 381)—it would have been a sheer physical impossibility for the Cuban Government to have confiscated more than one or two truckloads (624, 694).

In addition, it is undisputed that Petitioner complained strenuously to Navy officials that a competitor, Vargas, who had reconditioned a much smaller amount of salvaged materials in a storage area at Guantanamo, was permitted to remove them into Cuba about February 1961 (107, 191, 283, 284). And Vargas' materials were not confiscated when taken into Cuba (106, 107, 283-285).

III. Departure From the Accepted Course of Judicial Proceedings: Apart from I and II above, the Court below has so far departed from the accepted course of judicial proceedings as to call for the exercise of this Court's power of supervision.

A. The Court below sustained the Respondent in a position which is in breach of a duty of candor and good faith. The Government's failure to produce evidence "peculiarly within its possession" explaining what happened to the materials which were taken into its possession by its employees at Guantanamo, "casts an adverse inference," *Paccon, Inc.* v. *United States,*

185 Ct. Cl. 24, 40; *Alpirin* v. *United States,* 124 Ct. Cl. 670, 675, 111 F.Supp. 280, 283 (1953), *Interstate Circuit Inc.* v. *United States,* 306 U.S. 208, 221; 83 L.Ed. 610.

We submit that the Government should have had enough candor to explain what it did with the great quantity of Petitioner's materials physically taken by Government employees into its possession.

B. Except for the tiny sales described through April 1962 (*supra,* p. 10), it is undisputed that the great bulk of Petitioner's materials were physically taken by Respondent's employees, and that every item of Petitioner's materials wound up in the hands of Respondent. On these facts, Respondent should not be able to evade responsibility for them under the Fifth Amendment.

C. We submit that this Court should straighten out the Court of Claims on the unusually serious errors of evidence set forth in II above, p. 13). The appropriate consideration of evidence is specially important in that Court, if justice is to be done.

D. Finally, Petitioner should not be denied recovery when diplomatic relations between Cuba and the United States were broken, the two countries engaged in military hostilities at the Bay of Pigs, and the undisputed evidence, erroneously disregarded by the Court below, shows that it became the official Navy position to refuse to grant permission to Petitioner to remove the materials into Cuba, because that would help Castro (*supra,* p. 6-8).

Property rights are still important to this Petitioner Substantially all his assets are tied up in this litigation.

CONCLUSION

We submit that the Court should:

1. Grant the Petition and summarily reverse the decision below on the grounds stated above; or

2. Grant the Petition and summarily reverse the Court below on the dissent of Judge Davis (App. A-13); or

3. Grant the Petition and set the case for oral argument.

Respectfully submitted,

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In the United States Court of Claims

No. 110-69

(Decided January 26, 1977)

JUAN M. HUERTA v. THE UNITED STATES

F. Trowbridge vom Baur, attorney of record, for plaintiff. *vom Baur, Coburn, Simmons & Turtle*, of counsel.

Marc J. Fink, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before COWEN, *Chief Judge*, DAVIS, and KUNZIG, *Judges*.

OPINION

PER CURIAM: This case comes before the court on plaintiff's exceptions to the recommended decision of Trial Judge Louis Spector, filed October 21, 1975, pursuant to Rule 134(h), having been submitted on the briefs and oral argument of counsel. Upon consideration thereof, since the court agrees with the trial judge's recommended decision,* as hereinafter set forth, it hereby affirms and adopts said decision as the basis for its judgment in this case. It is, therefore, concluded that plaintiff is not entitled to recover and the petition is dismissed.

*The opinion of DAVIS, Judge, dissenting in part, follows the opinion of the trial judge which has been adopted by the court.

Whereas the court adopts the trial judge's separate findings of fact, which are set forth in his report filed October 21, 1975, they are not printed herein since such facts as are necessary to the decision are contained in his opinion.

OPINION OF TRIAL JUDGE

SPECTOR, *Trial Judge:* When Fidel Castro came to power in Cuba in 1959, many Cuban nationals and others lost commercial and personal property located in Cuba as a result of the confiscatory acts of the Castro regime. Plaintiff in this case, Juan M. Huerta, a Cuban national until his American naturalization in 1974, was one of those who incurred property losses attributable to the policies of the Cuban Government. His position is unique, however, in that part of his property so lost was situated on territory controlled not by Fidel Castro but by the U.S. Navy at Guantanamo. He brings this action to recover almost $900,000 on the alternative grounds of breach of contract, and the uncompensated taking of property. The property, hereinafter described, has rested on the naval base since the early 1960's, and what is left of it remains there today.

Plaintiff, aided by his brother Guillermo Huerta, conducted a large and profitable demolition, salvage, and construction materials business in Santiago, Cuba, during the period 1956–63. Beginning in 1958, he from time to time performed demolition work for the Navy on its base at Guantanamo Bay, some 80 miles from Santiago. In the years 1960, 1961, and 1962, plaintiff was awarded and performed five demolition contracts on the base, taking as the principal consideration for his work the title to all materials, with certain exceptions not relevant here, which he carefully salvaged from the structures he demolished. It had been plaintiff's custom under previous contracts to remove the salvaged materials to his place of business in Santiago for eventual resale. There was a brisk market for those materials in Cuba. However, for reasons vigorously disputed by the parties, the materials salvaged from the above five contracts never left the base but remained on a storage site that the Navy made available for plaintiff in late 1960. Those materials, now valueless due to prolonged exposure to the elements and certain alleged thefts, are the subject matter of this case.

Plaintiff claims that the United States is responsible for the fact that he received no economic benefit from his salvaged materials because of the acts and omissions of certain Naval personnel on the base. He states three separate

grounds for recovery. First he says the United States breached all five contracts when Navy officials in effect refused his requests for permission to take the materials into Cuba. They did this, he avers, by continually telling him over a 2-year period that removal to Cuba was not currently permissible, all the while assuring him that obstacles to removal would soon disappear. However, he says permission to remove was never granted, and this converted the Navy's words into ones of refusal.

Plaintiff's first theory of recovery is that the Navy's refusals constituted a breach by depriving him of the principal consideration for his contracts, by violating an implied covenant of cooperation, or by amounting to a cardinal change order. The latter premise is based on the parties' understanding in executing the contracts that plaintiff could and would take the salvaged materials into Cuba for resale.

The second ground asserted is that there was a taking of his property without compensation, by virtue of the same Navy refusals of his requests to remove it (hereinafter, "first taking claim"). Finally, plaintiff complains that his materials, while stored on the base, were physically appropriated by agents of the United States and used in the building of base structures. This, he urges, also constituted an uncompensated taking of his property ("second or pilferage taking claim").

The Government disclaims all responsibility for plaintiff's loss. It responds that plaintiff never requested permission to take his materials into Cuba; that he elected not to take the property there, for reasons hereinafter amplified, and that there was no appropriation of the materials for a public use by agents of the United States.

The defendant further disavows liability by raising a series of independent defenses unrelated to the above-described issue on the merits. Its answer to the petition alleges that since plaintiff was a Cuban national, this court lacks jurisdiction to entertain his suit under the so-called Reciprocity Statute, 28 U.S.C. § 2502 (1970), unless American citizens also had the right to sue the Cuban Government in its courts. Next, says defendant, the defense of "sovereign act" relieves it of any liability in contract that may arise from the imposition of a trade embargo in 1962, as further described below.

Finally, it raises for the first time (in its response to plaintiff's pretrial statement on liability) the defenses that the 6-year Statute of Limitations, 28 U.S.C. § 2501 (1970), had run before plaintiff filed his petition in this court on February 26, 1969, and further that the Government was discharged by releases executed by plaintiff on each of the five contracts. None of these independent defenses was raised by filing a motion for summary judgment.

As hereinafter indicated, this case has from the beginning been considered and tried on its facts, and on the "merits" issue earlier described. Resolution of that issue therefore represents the most efficient avenue for disposition of the case.

Trial was held on the breach and the two taking theories from March 26 to April 1, 1974. Earlier, the contracting officer had issued a final decision on August 9, 1967, denying plaintiff's request for an equitable adjustment under the five contracts. Plaintiff thereafter prosecuted an appeal to the Armed Services Board of Contract Appeals. The board denied the appeal on April 6, 1971, on the ground that relief was not available to plaintiff under the contract terms. On July 6, 1971, plaintiff filed a petition with this court amending his originally filed protective petition of February 26, 1969. The amended petition is the basis for the present suit for a breach and a taking. Plaintiff then moved for a trial de novo in this court. His motion was granted and not appealed. Defendant's later motion that the board's decision be deemed binding in the trial de novo was denied, and the denial upheld on appeal.

The testimony on the merits of the case is voluminous and in direct conflict, although certain details providing background for the parties' various actions are not disputed, and provide an important objective guide to resolution of conflicting evidence. The evidence is set forth in detail in the accompanying findings of fact, and only briefly summarized here.

The Government of Cuba, under Castro's leadership, embarked on a program of state ownership and direction of major, basic business enterprises in Cuba beginning in 1960. A large number of Cuban-owned businesses were "national-

ized" or "intervened" immediately and this pattern was continued over a period of years until even small enterprises were subjected to seizure starting in 1964. During the same period relations between the United States and Cuba deteriorated rapidly. All American property in Cuba was expropriated in late 1960, following President Eisenhower's reduction of the Cuban sugar import quota. After expropriation, the Commerce Department issued a ban on exports from the United States to Cuba.

The first contract at issue was signed just before the expropriation of American property by Cuba, and the second contract shortly thereafter. The two nations severed diplomatic relations in January 1961, just as performance on the first two contracts neared completion. By April of 1961, the Bay of Pigs invasion had occurred, failing in its objective, and creating further hostility between the two countries. Soon thereafter the Cuban Government forbade the movement of all vehicular traffic through the northeast gate at Guantanamo. This was the only land route from the Guantanamo Base to Cuba. In May 1961, the Cuban Central Bank placed tighter controls on foreign exchange transactions involving American dollars and Cuban pesos.

After performance under the third contract was completed, and while work on the fourth was underway, President Kennedy, on February 3, 1962, issued Proclamation No. 3447, placing a total embargo on Cuban-American trade. This Proclamation recited that the earlier Commerce Department ban on exports to Cuba remained in effect. Plaintiff and base construction officials thereafter recognized the February 1962 Proclamation as a legal impediment to the movement of plaintiff's property into Cuba from Guantanamo, and as the first such explicit barrier. The following month plaintiff signed the fifth and last contract. This was the only one containing a clause expressly permitting plaintiff to store his materials on the base.

On the breach of contract and "first taking" claim issues, the parties disagree as to whether plaintiff actually ever requested permission to take his materials from the base and into Cuba. This is the fundamental issue. There is a substantial body of evidence and a host of arguments addressed to

that crucial issue of fact. Plaintiff and his brother, Guillermo, testified that they made such requests to officials of the Base Public Works Center to whom such removal requests were traditionally addressed. The latter deny ever receiving any such requests. Each side produced exhibits and additional testimony in support of its respective version of the facts.

Defendant's witnesses state, for example, the plaintiff did not make timely cash payment of sums owed to the defendant under the first two contracts, due to his shortage of American dollars. Since this was the only form of payment acceptable under the contracts, the Navy then reluctantly arranged for the purchase of part of plaintiff's salvaged materials to satisfy plaintiff's debts to defendant. The significance of this, argues defendant, is that plaintiff could not have made his first three removal requests, as he testified he did, until those contract debts were satisfied since the contracts, by their terms, forbade removal of salvaged materials from the base until payment by the contractor. Plaintiff responds that he did not experience a dollar shortage at all during this period, and that the purchase of part of his salvaged materials to satisfy his contract obligations was the Navy's idea, not his. The Navy wanted the materials, he avers, or wished another party to have them.

Plaintiff accuses the Navy of blocking removal of his materials for the purpose of denying aid to the Castro Government, a goal popularly supported by public opinion at Guantanamo, particularly among the refugee population. Public Works officials respond that they had no such motivation and knew of no base policy to this effect. On the contrary, they testify, plaintiff was worried that if he took his materials into Cuba the Cuban Government would confiscate them, and he had so advised the Navy. Plaintiff denies that he had any fears of this sort nor that he made statements to that effect. Plaintiff further asserts that others on the base had heard him complain about Navy refusals to grant his removal requests and that one Sgt. (now Capt.) George Alvarez, USMC, told plaintiff that base officials could not let his salvaged materials enter Cuba due to the embarrassment that would result from aiding the Castro Government. Plaintiff's contacts with Alvarez, who was assigned to

intelligence duty by the base commander, were to convey information to him about events in Cuba. The Huerta brothers made frequent trips back and forth in connection with their business.

Defendant replies that the testimony of plaintiff's witnesses to that effect, including that of Alvarez, is mere hearsay, and that in any event it is not probative of the conduct of Public Works officials in charge of these particular contracts. It is further argued that Alvarez' statement represented a personal opinion, as he admitted, and that it was merely an affirmation of the fact that the 1962 trade embargo had by then already been imposed, rendering all other discussion academic.

To plaintiff's claim that the northeast gate into Cuba was closed by the Navy in February 1961, defendant responds that one Vargas, another demolition contractor, had taken his salvaged materials into Cuba through that gate in late February or early March 1961. Plaintiff also suggests that he was losing faith in the Navy's assurances of eventual permission to remove salvaged material, and this explains why he required greater compensation for the fifth and last contract. Defendant counters that he was the sole bidder for the fifth contract, and that would explain the higher compensation paid.

There is in the record a Public Works' letter of March 1, 1963, acknowledging a removal request had been made by plaintiff. Defendant explains that plaintiff asked the Public Works Center to write such a letter as a ploy to keep certain Cuban officials at bay. They were pressuring plaintiff to bring his salvaged materials into Cuba, a step which plaintiff did not wish to take. Defendant further questions why plaintiff never reduced his alleged removal requests to writing, and plaintiff explains that such requests had traditionally been oral.

The foregoing very lightly summarizes the conflicts in the testimony at trial. One thing is clear. Plaintiff's failure to take his salvaged materials into Cuba was followed by seizure of his entire Santiago business property by the Cuban government. He was reimbursed for only a fraction of its true value. Plaintiff and his brother thereafter became exiles.

Prior to exile, in August 1962, plaintiff had sought permission from the base to travel abroad to market his salvaged materials elsewhere, but he was refused permission on the ground that the 1903 Base Leasehold Agreement between Cuba and the United States prohibited use of the base as a commercial port by Cuban nationals. After he was exiled, however, he requested and received permission in mid-1963 to leave the base for the United States, and he attempted in at least one instance to locate buyers there for his salvaged materials. Public Works Center officials aided in this venture. Plaintiff returned to the base only once (from October 1963 to January 1964), and he has since lived in the United States. He has never managed either to sell or to remove the materials stored at Guantanamo.

Upon a review of the evidence as a whole, as detailed in the findings, it is concluded that plaintiff has failed to establish he ever made a request to the Public Works Center, or to anyone else in authority, for permission to remove his salvaged materials to Cuba. Instead, the evidence compels the conclusion that plaintiff elected to retain the materials at the storage site on Guantanamo, rather than ship his property into Castro Cuba, because that was the lesser of two evils during the period in question.

On the "second or pilferage taking claim," the parties are in equally serious dispute as to whether any persons removed plaintiff's materials from his stockpile without his approval, let alone whether any such persons who may have so removed materials did so as defendant's agents, or with authority from defendant. The use to which the allegedly pilfered materials was put, is also in dispute. Plaintiff contends through his witnesses that military and other base personnel from time to time took quantities of materials from his stockpiles and used them in Government construction on the base. However, no witness for plaintiff could testify to an occasion when he saw base construction personnel actually remove material from the stockpile without plaintiff's permission.

Furthermore, the quantum of materials said to have been taken was not stated; the authority of the alleged pilferers was not established; and the base structures which allegedly benefited from the pilferage were not identified. Defendant

did establish through the testimony of Public Works officials, moreover, that orders had been issued to all base personnel, civilian and military, involved in Government construction work at Guantanamo, to the effect that plaintiff's materials were private property and could be acquired only with plaintiff's authorization.

Taking all the evidence on this issue into account, it is further concluded that plaintiff has not established the removal or pilferage of his property by persons on the base, nor the identity of the alleged pilferers as agents of the defendant, nor the use of his property in Government structures, nor the authority for any such appropriation or use.

On the basis of the foregoing ultimate conclusions of fact, it follows that plaintiff is not entitled to recover on any of his three stated grounds. A breach would depend on requests for permission to remove, which were wrongfully refused. Those essential facts have not been established in this case.[1]

The second ground predicated on an uncompensated "taking" is also starved for want of the same essential facts, namely, persuasive proof of requests for permission to remove, followed by refusal of those requests. One can readily appreciate the plight of plaintiff, unable to remove his property to any place but Cuba because of the 1903 lease agreement for Guantanamo, and unwilling to remove it to Cuba because of the historical events which had overtaken that country. As a result, his property was virtually imprisoned on the base. But that is not to say that defendant, in its contractual capacity, was responsible for these most unfortunate circumstances.[2]

The concept of a "taking" of property, within the contemplation of the fifth amendment, is premised on "governmental actions entail[ing] * * * an actual invasion of private property rights." Though there need be no official intention to

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[1] *See* and contrast *Miller* v. *United States*, 135 Ct. Cl. 1, 140 F. Supp. 789 (1956), where a purchaser of Government property was specifically advised by the Government that it would not be delivered to him.

[2] Plaintiff cites the 1960 Commerce Departm. nt export ban, the 1962 trade embargo, and the alleged assurances of Navy officials that these obstacles would eventually be lifted, as Government action that deprived him of his property. But those public acts were general acts of the sovereign and do not establish liability for breach, or for a taking. *See*, for example, *Glasgow Associates* v. *United States*, 203 Ct. Cl. 532, 542–43, 495 F. 2d 765, 770–71 (1974).

acquire any property interest "interference with use or possession" of property is essential to a taking claim. *Eyherabide* v. *United States*, 170 Ct. Cl. 598, 601, 345 F. 2d 565, 567 (1965). Plaintiff has simply failed to establish that Navy officials acted to invade his rights in the salvaged materials, or to interfere with his use or possession thereof, by denying transit to Cuba, or otherwise.[3]

The "second or pilferage taking" claim relies on different facts. Plaintiff's witnesses referred to these alleged appropriations as thefts, stealing, and pilferage. But here again the evidence falls short. It has not been shown that materials were removed by persons acting without plaintiff's permission, that those persons were Government agents, or that the material so removed was incorporated in Government construction.[4]

If unlawful acts by Government personnel did in fact occur, they would not in any event constitute a "taking" by defendant, but rather tortious acts beyond the jurisdiction of this court to consider.[5]

Accordingly, it is concluded that plaintiff is not entitled to recover on any of the three grounds offered. In view of that conclusion on the facts, and on the merits, it is unnecessary to reach the independent issues raised by defendant as earlied mentioned, nor the contentions of the parties addressed thereto, on sovereign act, jurisdiction, releases and limitations.

DAVIS, *Judge*, dissenting in part:

I join the majority of the panel in adopting most of the Trial Judge's opinion and findings but I dissent with respect

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[3] *See & cf. Lemmons* v. *United States*, 204 Ct. Cl. 404, 496 F. 2d 864 (1974); *Societe Cotonniere Du Tonkin* v. *United States*, 145 Ct. Cl. 426, 171 F. Supp. 951 (1959), *cert. denied*, 361 U.S. 965 (1960).

[4] *See Eyherabide*, text at note 3 *supra*. *See also Porter* v. *United States*, 204 Ct. Cl. 355, 496 F. 2d 583 (1974), *cert. denied*, 420 U.S. 1004 (1975); *Housing Corp. of America* v. *United States*, 199 Ct. Cl. 705, 711, 468 F. 2d 922, 925 (1972); *Kelly* v. *United States*, 146 Ct. Cl. 416 (1959), *cert. denied*, 362 U.S. 975 (1960).

[5] *United States* v. *North Am. Transp. & Trading Co.*, 253 U.S. 330, 334 (1920); *Schillinger* v. *United States*, 155 U.S. 163, 168 (1894); *Anggelis* v. *United States*, 202 Ct. Cl. 1094, *cert. denied*, 414 U.S. 1065 (1973); *Algonac Mfg. Co.* v. *United States*, 192 Ct. Cl. 649, 663, 428 F. 2d 1241, 1249 (1970); 28 U.S.C. § 1491 (1970).

to the so-called "pilferage taking claim." As to that demand I think that claimant has shown enough to warrant a judgment in his favor on liability, as well as a remand to the Trial Division to determine the amount of that taking and the quantum of recovery.

The main facts and factors leading me to the other position on this claim are these: (a) it is undisputed that by 1973 almost all of the lumber and material had disappeared, and it seems to me clear that by 1967 very serious losses had occurred; (b) the record makes it very unlikely, in my view, that the bulk of these losses was due to climatic conditions or to sales by the plaintiff; (c) on the contrary, the record persuades me that the great bulk of the materials were taken by personnel living or stationed on the base for use in connection with buildings or structures (on the base) owned by the United States and affixed to real property leased for a very long period to the United States (there were no private buildings and no private lands on the base); (d) there was sufficient, uncontradicted testimony that many of the materials removed from plaintiff's lots were taken by United States personnel in uniform and in government vehicles; (e) the Government necessarily received and retained the benefit of the removed materials because they were incorporated and used in government-owned buildings and structures; (f) whether or not the takings of this property were initially authorized, the Government obtained and retained the benefit of the removals and should therefore be required to pay just compensation (*see Oro Fino Consolidated Mines, Inc.* v. *United States*, 118 Ct. Cl. 18, 23, 92 F. Supp. 1016, 1019 (1950), *cert. denied*, 341 U.S. 948 (1951); *Forest of Dean Iron Ore Co.* v. *United States*, 106 Ct. Cl. 250, 65 F. Supp. 585 (1946); *Silberman* v. *United States*, 71 F. Supp. 895, 896 (D. Mass. 1947); *Ivey* v. *United States*, 88 F. Supp. 6, 8–9 (E.D. Tenn. 1950)); and (g) in any event, the defendant's inadequate efforts to prevent pilferage by personnel over whom it had the widest control (*i.e.* all personnel on the base), especially since that pilferage redounded to the defendant's own ultimate benefit, lead me to conclude that the "takers" had sufficient implied authority (*cf. Eyherabide* v. *United States*, 170 Ct. Cl. 598, 606–607, 345 F. 2d 565, 570 (1965)).

This taking claim is not barred by limitations since, in my view, it did not mature until after June–July 1963 (*see* finding 79 and *United States* v. *Dickinson*, 331 U.S. 745 (1947)). The petition here was filed less than six years later in February 1969. As for the defense under 28 U.S.C. § 2502 (reciprocity), I would hold that provision inapplicable to suits by alien friends for just compensation for property taken by the United States within an area over which the United States has as much control as over Guantanamo Naval Base. *See Russian Volunteer Fleet* v. *United States*, 282 U.S. 481, 491–92 (1931).

CONCLUSION OF LAW

Upon the findings of fact and the foregoing opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover and the petition is dismissed.

IN THE UNITED STATES COURT OF CLAIMS

No. 110-69

JUAN M. HUERTA

v.

THE UNITED STATES

Before DAVIS, *Judge*, Presiding, COWEN, *Senior Judge*, and KUNZIG, *Judge*.

Order

This case comes before the court on plaintiff's motion, filed February 9, 1977, for rehearing *en banc* pursuant to Rules 7 and 151 as to the judgment entered herein on January 26, 1977, dismissing plaintiff's petition. Upon consideration thereof, together, with the response in opposition thereto, without oral argument, by the then seven active Judges of the court as to the suggestion for rehearing *en banc* under Rule 7, which suggestion is denied, and further having been so considered by the panel listed above as to the motion for rehearing under Rule 151.

IT IS ORDERED that plaintiff's said motion for rehearing be and the same is denied, and

IT IS FURTHER ORDERED that the slip opinion entered and announced herein on January 26, 1977, be and the same is amended in that the words and language "in the circumstances of this case" are to be added and inserted after the word "taking" appearing in the fifth line of footnote 2 on page 9 thereof.

BY THE COURT

/s/ OSCAR H. DAVIS
Oscar H. Davis
Judge, Presiding

March 4, 1977

APPENDIX B

Constitutional, Statute and Treaty Provisions

Relevant Portions of the Fifth Amendment to the Constitution of the United States

"No person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Excerpts From the Export Control Act of 1949 60 U.S.C.A. App. §§ 2022-23

"§ 2022. Congressional declaration of policy

"The Congress declares that it is the policy of the United States to use export controls to the extent necessary (a) to protect the domestic economy from the excessive drain of scarce materials and to reduce the inflationary impact of abnormal foreign demand; (b) to further the foreign policy of the United States and to aid in fulfilling its international responsibilities; and (c) to exercise the necessary vigilance over exports from the standpoint of their significance to the national security. Feb. 26, 1949, c. 11, § 2, 63 Stat. 7."

"§ 2023. Authority to effectuate policies; delegation; limitations

"(a) To effectuate the policies set forth in section 2 hereof [section 2022 of this Appendix], the President may prohibit or curtail the exportation from the United States, its Territories, and possessions, of any articles, materials, or supplies, including technical data, except under rules and regulations as he shall prescribe. To the extent necessary to achieve effective enforcement of this Act [sections 2021-2032 of this Appendix], such rules and regulations may apply to the

financing, transporting, and other servicing of exports and the participation therein by any person."

Excerpts From the Foreign Assistance Act of 1961
22 U.S.C.A. § 2370(a)(1) (1963)

"§ 2370. Prohibitions against furnishing assistance—Cuba; embargo on all trade.

"(a)(1) No assistance shall be furnished under this chapter to the present government of Cuba; nor shall any such assistance be furnished to any country which furnishes assistance to the president government of Cuba unless the President determines that such assistance is in the national interest of the United States. As an additional means of implementing and carrying into effect the policy of the preceding sentence, the President is authorized to establish and maintain a total embargo upon all trade between the United States and Cuba."

Presidential Proclamation No. 3447
Feb. 3, 1962, 27 FR 1085

EMBARGO ON TRADE WITH CUBA

WHEREAS the Eighth Meeting of Consultation of Ministers of Foreign Affairs, Serving as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance, in its Final Act resolved that the present Government of Cuba in incompatible with the principles and objectives of the Inter-American system; and, in light of the subversive offensive of Sino-Soviet Communism with which the Government of Cuba is publicly aligned, urged the member to take those steps that they may consider appropriate for their individual and collective self defense;

WHEREAS the Congress of the United States, in section 620(a) of the Foreign Assistance Act of 1961 (75 Stat.

445), as amended [subsection (a) of this section], has authorized the President to establish and maintain an embargo upon all trade between the United States and Cuba; and

WHEREAS the United States, in accordance with its international obligations, is prepared to take all necessary actions to promote national and hemispheric security by isolating the present Government of Cuba and thereby reducing the threat posed by its alignment with the communist powers:

NOW, THEREFORE, I, JOHN F. KENNEDY, President of the United States of America, acting under the authority of section 620(a) of the Foreign Assistance Act of 1961 (75 Sts. 445), as amended [subsection (a) of this section], do

1. Hereby proclaim an embargo upon trade between the United States and Cuba in accordance with paragraphs 2 and 3 of this proclamation.

2. Hereby prohibit, effective 12:01 A.M. Eastern Standard Time, February 7, 1962, the importation into the United States of all goods of Cuban origin and all goods imported from or through Cuba; and I hereby authorize and direct the Secretary of the Treasury to carry out such prohibition to make such exceptions thereto, by license or otherwise, as he determines to be consistent with the effective operation of the embargo hereby proclaimed, and to promulgate such rules and regulations as may be necessary to perform such functions.

AND FURTHER, I do hereby direct the Secretary of Commerce, under the provisions of the Export Control Act of 1949, as amended (50 U.S.C. App. 2021-2032) [sections 2021-2032 of Appendix to Title 40, War and National Defense], to continue to carry out the prohibition of all exports from the United States to Cuba, and I hereby authorize him, under that Act, to continue, make, modify, or revoke exceptions from such prohibition.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

DONE at the City of Washington this third day of February, in the year of our Lord nineteen hundred and sixty-two, and of the Independence of the United States of America the one hundred and eighty-sixth.

[SEAL] JOHN F. KENNEDY

Agreement with Cuba Establishing the Guantanamo Naval Base

Treaty Series 418

"AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF CUBA FOR THE LEASE (SUBJECT TO TERMS TO BE AGREED UPON BY THE TWO GOVERNMENTS) TO THE UNITED STATES OF LANDS IN CUBA FOR COALING AND NAVAL STATIONS.

"The United States of America and the Republic of Cuba, being desirous to execute fully the provisions of Article VII of the Act of Congress approved March second, 1901, and of Article VII of the Appendix to the Constitution of the Republic of Cuba promulgated on the 20th of May, 1902, which provide:

" 'Article VII. To enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its own defense, the Cuban Government will sell or lease to the United States the lands necessary for coaling or naval stations, at certain specified points, to be agreed upon with the President of the United States.'

have reached an agreement to that end, as follows:

"ARTICLE I

The Republic of Cuba hereby leases to the United States, for the time required for the purposes of coaling and naval stations, the following described areas of land and water situated in the Island of Cuba:

• • •

[Description of areas of land and water omitted.]

"ARTICLE II

The grant of the foregoing Article shall include the right to use and occupy the waters adjacent to said areas of land and water, and to improve and deepen the entrances thereto and the anchorages therein, and generally to do any and all things necessary to fit the premises for use as coaling or naval stations only, and for no other purpose.

Vessels engaged in the Cuban trade shall have free passage through the waters included within this grant.

"ARTICLE III

While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over and above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas with the right to acquire (under conditions to be hereafter agreed upon by the two Governments) for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain with full compensation to the owners thereof.

• • •

"The United States of America and the Republic of Cuba, being desirous to conclude the conditions of the lease of areas of land and water for the establishment of naval or coaling stations in Guantanamo and Bahia Honda the Republic of Cuba made to the United States by the Agreement of February 16/23, 1903, in fulfillment of the provisions of Article Seven of the Constitutional Appendix of the Republic of Cuba, have appointed their Plenipotentiaries to that end.

"The President of the United States of America, HERBERT G. SQUIERS, Envoy Extraordinary and Minister Plenipotentiary in Havana.

"And the President of the Republic of Cuba, JOSE M. GARCIA MONTES, Secretary of Finance, and acting Secretary of State and Justice, who, after communicating to each other their respective full powers, found to be in due form, have agreed upon the following articles:

* * *

"ARTICLE III

The United States of America agrees that no person, partnership, or corporation shall be permitted to establish or maintain a commercial, industrial or other enterprise within said areas."

Excerpts From Current Export Bulletin Number 840, Dated October 19, 1960

"SUBJECT: Exports to Cuba

"PURPOSE AND EFFECT:

"The Export Regulations issued by the Department of Commerce previously provided that exports to Cuba could be made under the same regulations as

exports to other Western Hemisphere countries, with the exception of certain limitations on the use of General Licenses GRO and GLV for exports of jeeps, trucks, and certain parts therefor. In view of the deterioration of relationships between Cuba and the United States the Export Regulations have been revised to require validated licenses for shipments of most commodities and technical data to that destination. Certain foods (other than agricultural products eligible for subsidy payments or stocked by the Commodity Credit Corporation), medicines, and medical supplies are the only commodities to remain under general license.

"In addition, for those exports which require a validated license, it will be the general policy of the Bureau of Foreign Commerce to reject all export license applications for any commodities except certain foodstuffs which are neither subsidized nor obtained didirectly or indirectly from the Commodity Credit Corporation stocks."

APPENDIX C

Excerpts from Plaintiff's Exhibit 6

Petitioner's Letter to the Officer in Charge of Construction at Guantanamo, dated December 21, 1965, Which the Navy Never Denied (Translated from the Spanish)

"[*D*]*uring all this time I indicated to the Commanding Officer, PWC, that I must remove these materials to Cuba* where I would have sold them and salvaged my investment in the same. Furthermore, I told them that to continue to store these materials there for so long would cause me grave problems with the Government of Cuba. *He (CO PWC) answered me that to move these materials to Cuba was somewhat problematic and embarrassing* and that I would have no trouble in leaving these materials where they are in hopes of a more favorable solution.

"In the month of February 1963, I informed the Commanding Officer PWC that my situation with the authorities of Cuba was more critical each day because of these materials. On this opportunity *said Commanding Officer, PWC gave me a written communication which informed me that my request to remove these materials to Cuba was being considered* by the Base Commander and that he estimated that authorization would be delivered to me within two months. (Emphasis added.)

• • •

"Also a large part of said materials have been taken and utilized in jobs by the Government on that Base throughout the time in which they have been in that place.

". . . I pointed out before these materials have been taken and used continually in maintenance activities of the Government, etc. in a large part, or a large portion of the same . . . ."

Supreme Court, U. S.
FILED
AUG 15 1977
MICHAEL RODAK, JR., CLERK

No. 76-1707

In the Supreme Court of the United States

OCTOBER TERM, 1977

JUAN M. HUERTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1707

JUAN M. HUERTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims that the United States must compensate him for damage to or loss of his property at Guantanamo Naval Base in Cuba. The Court of Claims dismissed his petition in an opinion on which we principally rely (Pet. App. A).

In 1960, 1961, and 1962, petitioner was awarded and performed five demolition contracts at the Guantanamo Naval Base, and he took the materials from the structures that he demolished as the principal consideration for his work. Petitioner's practice under previous contracts had been to remove the materials he salvaged to his place of business in Santiago, Cuba, for resale. However, petitioner did not remove the materials salvaged from the work on these five contracts. Instead, the materials remained on a storage site on the base. The materials are

now valueless due to prolonged exposure and alleged pilferage (Pet. App. A-2).

Petitioner sued to recover the value of the materials, contending that the United States breached the demolition contracts by refusing to let him take his materials from the Naval Base into Cuba. Petitioner also claimed that refusal of such permission amounted to a taking of the property and that in any event the United States was indebted to him because its agents allegedly appropriated the materials for use in government buildings on the base. The United States answered that petitioner in fact had never requested permission to remove the materials and that it was not responsible for whatever pilferage may have taken place (Pet. App. A-2 to A-3).

The Court of Claims, with one judge dissenting, found that petitioner had not proven that he was entitled to recover and dismissed his petition. The court noted that the "fundamental issue" on the breach of contract and taking claims was "whether [petitioner] actually ever requested permission to take his materials from the base and into Cuba" (Pet. App. A-5). The court found that petitioner had never made such a request to anyone in authority. Instead, the court found (Pet. App. A-8):

> [T]he evidence compels the conclusion that [petitioner] elected to retain the materials at the storage site on Guantanamo, rather than ship his property into Castro Cuba, because that was the lesser of two evils during the period in question.

Similarly, the Court of Claims rejected petitioner's pilferage claim because "here again the evidence falls short" (Pet. App. A-10): "It has not been shown that materials were removed by persons acting without [petitioner's] permission, that those persons were Government

agents, or that the material so removed was incorporated in Government construction."

As to petitioner's claim that the government's export ban and trade embargo constituted an impermissible "taking" of property in violation of the Fifth Amendment, the court held that these "general acts of the sovereign * * * do not establish liability for breach, or for a taking in the circumstances of this case" (Pet. App. A-9, n. 2; A-13).

Petitioner argues that the government's ban of exports to, and its embargo of trade with, Cuba constituted a "taking" of his property in violation of the Fifth Amendment (Pet. 12-13). This contention is without merit. Although "every regulation necessarily speaks as a prohibition," a sovereign's valid exercise of its powers does not amount to a taking of property merely because it restricts the use of the property. *Goldblatt* v. *Hempstead*, 369 U.S. 590, 592; *South Terminal Corp.* v. *Environmental Protection Agency*, 504 F. 2d 646, 678 (C.A. 1). Here, the trade embargo at most prevented petitioner from removing his property into Cuba. He travelled to the United States in 1963 in an attempt to sell the materials in this country but was unsuccessful (Pet. App. A-8). In any event, removal of the materials to Cuba would have been risky indeed, since petitioner's place of business in Santiago was seized by the Cuban government and petitioner was "reimbursed for only a fraction of its true value" (Pet. App. A-7). Indeed, the court below concluded from the evidence that petitioner chose to keep the materials on the base to avoid further seizure (Pet. App. A-8). Under these circumstances, the court was plainly correct in holding that the trade embargo did not effect a taking of petitioner's property.

Petitioner's argument that he was denied "procedural due process" is premised on a contention that the court below refused to accord proper weight to petitioner's evidence (Pet. 13-16). As petitioner himself concedes (Pet. 13-15), while one of the witnesses, Sergeant Alvarez, testified that petitioner did request permission to remove his goods into Cuba, other witnesses, Captain Burky and Lieutenant Cronenberg, testified that he never made any such request (Pet. 15). The trial judge acknowledged that the testimony on this issue was in "direct conflict" (Pet. App. A-4) and concluded that petitioner had chosen not to remove his property from the base and so expose it to seizure by the Cuban government. The trial judge's conclusion on this issue does not warrant this Court's review.

Similarly, petitioner attempts (Pet. 16-17) to reargue his pilferage claim. The court below found that petitioner failed to prove any of the essential elements of that claim (Pet. App. A-9). Specifically, the trial judge noted that no witness saw base personnel actually remove material from the stockpile without petitioner's permission (Pet. App. A-8). Furthermore, "the quantum of materials said to have been taken was not stated; the authority of the alleged pilferers was not established; and the base structures which allegedly benefited from the pilferage were not identified" (*ibid.*). There is no reason for this Court to review this factual finding by the trial judge.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1977.

Supreme Court, U. S.
FILED
AUG 26 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1707

JUAN M. HUERTA, *Petitioner*
v.
THE UNITED STATES, *Respondent*

On Petition For a Writ of Certiorari To the United States Court of Claims

PETITIONER'S REPLY TO THE MEMORANDUM OF THE UNITED STATES IN OPPOSITION

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PETITIONER'S REPLY TO THE MEMORANDUM OF THE UNITED STATES IN OPPOSITION

Respondent controverts very little in our Petition for Certiorari.

1. On Page 2, Respondent states that the Court of Claims found that Petitioner had never made a request to take his materials from the base into Cuba, suggesting that this was the "lesser of two evils." Although Respondent does not come right out and say so, the supposedly greater "evil" is suggested to be a threat by Cuban officials to "confiscate" Petitioner's

materials if they were removed into Cuba. But Respondent does not deny that, as set forth in our Petition, pages, 15, 16, "confiscation" of the salvaged materials would have been a sheer, physical impossibility. Hence, any findings by the Court below based upon a likelihood of "confiscation" of the salvaged materials are unsupported by credible evidence.

2. *Taking by Sovereign Act:* Failing to face up to or even mention the key language in the opinion below dealing with "taking" by sovereign act (Pet. p. 12), Respondent now (p. 3) apparently backs away from its position in the Court below (Pet. pp. 11, 12) that a sovereign act cannot constitute a taking under the Fifth Amendment. But Respondent did so argue in the Court below, and it so held. It held that the 1960 Commerce Department Export ban, and the 1962 Trade Embargo constituted

> "government actions that deprived him of his property. But those public acts were general acts of the sovereign and do not establish liability for breach, or for a taking." Pet. App. A-9, note 2.

Apparently, Respondent seeks to avoid having this Court settle this important question in our case so as to leave Respondent free to continue to raise this specious defense in other cases.

However, Respondent does go so far as to state that the "trade embargo at most prevented petitioner from removing his property into Cuba." (p. 3.) Even if this were all the Court below held, that would constitute a "taking." Prohibiting Petitioner from removing the materials into Cuba—the only place where they could be sold—constituted a taking of his property. So far

as Petitioner was concerned, this prohibition rendered his materials valueless.

In addition, the cases cited by Respondent (p. 3) confirm that the Government "took" the Huerta's property for purposes of the Fifth Amendment. In *South Terminal Corp.* v. *Environmental Protection Agency,* 504 F.2d 646 (1st Cir. 1974), the Court stated:

> "First, a particular use of a parcel of property may be regulated or forbidden. Second, all uses of a parcel may be forbidden. Third, the right to use . . . property in a particular and permitted way may be transferred to . . . a governmental body. Only the second and third situations are thought of as takings today." 504 F.2d at 679.

In our case, both the second and third situations described above are present. All uses to which the Huertas might have put their property were forbidden by the embargo; and as there is no private property on Guantanamo, the right to use the property at all was effectively transferred by the embargo to the United States. Indeed, all Petitioner's materials wound up in the hands of the Government.

Moreover, removing the goods from the Base for sale anywhere except Cuba, including sale in the U.S., would violate the Treaty provisions with Cuba which prohibit the use of the Base for "any commercial, industrial or other enterprise." Pet. p. 5. In addition, the officials at Guantanamo refused to allow Petitioner to try to sell his materials elsewhere. Pet. p. 5, Finding 43.

We submit that it is elementary that private property can be taken for public use by sovereign act. When private property is taken for public use by sov-

ereign act, a "taking" under the Fifth Amendment necessarily occurs. Otherwise, the Fifth Amendment would be meaningless.

3. *Sergeant Alvarez:* On Page 4, Respondent takes refuge in an erroneous representation of Petitioner's position with regard to the testimony of Sergeant Alvarez. We never contended that "the Court below refused to accord proper weight to petitioner's evidence." Our position is that the Trial Judge erroneously disregarded the testimony of Sergeant Alvarez on the astonishing ground that it was "hearsay." Pet. p. 7. Indeed, Respondent does not deny that Alvarez' testimony was disregarded below as "hearsay." Respondent, however, asserts (p. 4) that the testimony as to whether Petitioner requested permission to remove the materials into Cuba was in " 'direct conflict' (Pet. App. A-4)." But any such "conflict" did not embrace the testimony of Sergeant Alvarez. Having been disregarded as "hearsay," (Pet. p. 7) the Alvarez testimony was necessarily excluded from the evidence which was deemed to be in conflict. Moreover, the fact that as "hearsay" the Alvarez testimony was excluded from consideration is vividly shown by the fact that the Court below made no mention of its content, which is briefly summarized in the Petition at pages 7 and 8.

In addition, Sergeant Alvarez' undisputed testimony went far beyond stating that there had been many requests by Petitioner to remove his materials into Cuba. For Alvarez' testimony was that Alvarez was told by his superiors, who also knew all about Petitioner's requests to remove the materials, that permission to remove the materials "would not be granted." "Nothing could be done for the Huertas." "We could not get the

permission that they [the Huertas] wanted." Pet. p. 8. It is also undisputed that it was Guantanamo Base policy "not to help the Castro Government." Pet. p. 8. *See also* Petition, pp. 7, 8.

4. *The Physical Taking of Petitioner's Materials:* Respondent does not deny that the strong and powerful evidence of a physical taking of Petitioner's materials by U.S. Government employees, many in military uniform and actually using U.S. Government trucks (Pet. pp. 8-10), is undisputed, and that Judge Davis in his articulate dissent stated that it was undisputed. Pet. App. A-10.

Nor does Respondent deny that the Trial Judge substantially admitted that substantial amounts of Petitioner's materials were physically taken by civilian employees of Respondent and were incorporated into "family residences" which were U.S. Government buildings at Guantanamo. Pet. p. 10. Thus, these are admitted takings under the Fifth Amendment on this record, of the most glaring and flagrant character. This fact alone requires a reversal of the decision below.

As for the vague statements in the majority opinion that the "authority of the alleged pilferers was not established," etc. (Resp. p. 4), the evidence showing that the materials were taken by Government employees, and that they wound up in the hands of the Government and in Government buildings is not only undisputed. In addition, the majority opinion never even ventured to disagree with the facts stated in Judge Davis' dissent summarizing the physical takings of Petitioner's materials and their incorporation into U.S. Government buildings.

All in all, the Petition raises the major question, among others, whether a sovereign act can constitute a "taking" under the Fifth Amendment. We submit that that question should be settled by this Court.

The physical takings of Petitioner's materials are undisputed.

In addition, the decision below represents a serious miscarriage of justice, which we submit this Court should correct.

Respectfully submitted,

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August 26, 1977